

198TASSA

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 ASSURED GUARANTY MUNICIPAL  
4 CORP. f/k/a Financial Security  
Assurance, Inc.,

5 Plaintiff,

6 v.

11 CV 2375 (RPP)

7 FLAGSTAR BANK, FSB, et al.,

8 Defendants.

9 -----x

New York, N.Y.  
September 8, 2011  
5:10 p.m.

10  
11 Before:

12 HON. JED S. RAKOFF,

District Judge

13 APPEARANCES

14  
15 SUSSMAN GODFREY LLP  
16 Attorneys for Plaintiff  
17 BY: JACOB W. BUCHDAHL  
THANE REHN

18 ARNOLD & PORTER LLP  
19 Attorneys for Defendants  
20 BY: VERONICA E. RENDON  
DANIEL M. KUHN  
21  
22  
23  
24  
25

198TASSA

1 (In open court, case called)

2 MR. BUCHDAHL: For plaintiff, Assured Guaranty, Jacob  
3 Buchdahl and Thane Rehn from Susman Godfrey. Good afternoon.

4 THE COURT: Good afternoon.

5 MS. RENDON: And for the defendants, Veronica Rendon  
6 and my colleague, Daniel Kuhn.

7 THE COURT: Good afternoon.

8 I assume both sides got the memorandum I issued  
9 earlier today.

10 MR. BUCHDAHL: We did, your Honor.

11 MS. RENDON: We did, your Honor.

12 THE COURT: So we're here on the motion in limine  
13 regarding the use of sampling. Let me throw out my initial  
14 thoughts. This is not a ruling at all, just where my head is  
15 at, so to speak, at the moment, but it will show you what you  
16 need to shoot at, so to speak.

17 I do think this is an appropriate case for the use of  
18 statistical sampling, but certainly I'm not prepared to sign  
19 off on it until I see the methodology that the expert uses. So  
20 I think it would be perfectly appropriate for the plaintiffs to  
21 go ahead and hire an expert and do some sampling, but in the  
22 end I may find that the methodology is flawed or that it's  
23 inadmissible for some other reason. So that's my initial  
24 thoughts.

25 Let me hear from defense counsel first and then I'll

198TASSA

1 hear from plaintiff's counsel.

2 MS. RENDON: Your Honor, I'll keep it relatively  
3 brief, because I think what you just touched on is exactly our  
4 primary issue with the motion that's being submitted at this  
5 point. In other words, it's premature and impossible to  
6 properly consider as a result of the failure for there to be a  
7 methodology that has been proposed at this point in time that  
8 can be meaningfully considered or ruled upon.

9 And basically at this point the motion in limine that  
10 is being made or that is being styled as a motion in limine is  
11 effectively reading like an opposition to a Daubert motion that  
12 we never filed because it would be impossible for to us have  
13 filed at this point because fact discovery hasn't even  
14 concluded, much less expert discovery, and expert reports  
15 haven't been submitted that we can meaningfully sink our teeth  
16 into.

17 THE COURT: So the sensible thing you're saying -- and  
18 plaintiffs may agree with this -- is, as with any expert, you  
19 take your chances, and if in the end I find that the  
20 methodology is flawed or there is some other problem, that will  
21 be too bad for their expert. But on the other hand, the most  
22 I'm prepared to say right now is that I don't see anything in  
23 the nature of this case that would inherently make it  
24 inappropriate for a statistical sampling, given the allegations  
25 in the complaint.

198TASSA

1           So as I pointed out the memorandum that you got  
2 today -- the main reason you got it today is I'm very glad we  
3 had this conference because it forced me to get to work on your  
4 case. But as I read the complaint, there are many  
5 commonalities to the various mortgages and loans involved here.  
6 Of course, that may prove not to be the case, I don't know, I'm  
7 just going from the allegations. But assuming for the sake of  
8 argument that is the case, then statistical sampling would, in  
9 theory, be a perfectly appropriate way to proceed.

10           So let me hear from plaintiff's counsel if you have  
11 any concerns.

12           MR. BUCHDAHL: Your Honor, based on the text of the  
13 order that we read this morning and what you have said today, I  
14 think we have heard all that we need to hear. But to be clear,  
15 the defendant's opposition to the use of sampling was never  
16 based on methodology, or at least it wasn't primarily based on  
17 methodology, the defendant's opposition was based on the fact  
18 that sampling was unnecessary because this case would only be  
19 about 264 loans. I think your opinion that we read this  
20 morning makes it clear that is not the case.

21           Second, the defendants took the position, and have  
22 consistently, that there is something incompatible between the  
23 use of sampling and the repurchase remedy. And I think the  
24 opinion today also made clear that is not the case, because one  
25 could calculate a remedy or damages --

198TASSA

1 THE COURT: Well, you're right with a very important  
2 caveat, that my opinion is premised solely on the allegations  
3 in the complaint.

4 MR. BUCHDAHL: Absolutely. And your Honor, we  
5 understand we retain the burden to prove every element of our  
6 claims, and we intend to do so, but the reason we filed the  
7 motion that we did is because of some of the issues that had  
8 been brought up by the defendant.

9 THE COURT: As I said, it had a collateral positive  
10 effect anyway.

11 MR. BUCHDAHL: For purposes of our motion, we could do  
12 whatever the Court wants. If you want us to simply withdraw  
13 it --

14 THE COURT: I think the motion should be withdrawn as  
15 in effect moot at this stage, and we'll take it if and when you  
16 file an expert report. And if and when they move to strike  
17 your expert report or otherwise limit it, that will be the  
18 proper time, we'll have a Daubert hearing or whatever, and  
19 they, of course, at that point can say based on discovery it's  
20 not at all what the plaintiffs said in their complaint and it  
21 doesn't lend itself to a statistical sampling. That would  
22 really in effect be a logical objection as well.

23 So you could put whatever label you want on it, I'm  
24 just saying defense is not precluded from reraising that  
25 argument against a different factual record than we have before

198TASSA

1 the Court right now. But why don't we just view the motion as  
2 withdrawn as moot without prejudice.

3 MS. RENDON: And your Honor, just to be clear -- and I  
4 think you just said that, but I want to be clear on the record  
5 that in what we have just heard on the record it would not be  
6 inconsistent for defendants to raise an objection at some later  
7 point in time when a motion in limine for a sampling or an  
8 objection to sampling is made that it is in fact inconsistent  
9 with other provisions in the contracts based upon what's  
10 developed during factual discovery.

11 THE COURT: Yeah, I mean the only thing I want to flag  
12 for you is, at least based on what is in the complaint, this  
13 looks to me like a case where statistical sampling would not a  
14 priori be precluded, but all I know is what's in the complaint.  
15 So you're not being ruled against in any way, shape or form.

16 MS. RENDON: Thank you, your Honor.

17 THE COURT: Very good. Thanks so much.

18 o0o  
19  
20  
21  
22  
23  
24  
25